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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. --------

PEGGY SANDERS, DIANE BERRY, MARY NELSON, NANCY JAMES, GRETCHEN MONTGOMERY, VIRGINIA MONROE, GENEVA BATTLE, individually and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services and JULE M. SUGARMAN, as Commissioner of the New York City Department of Social Services,

Respondents.

BRIEF OF RESPONDENT SUGARMAN IN OPPOSITION TO PETITION FOR CERTIORARI

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PETITION NOT PRINTED

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Question Presented

The complaint alleges that the plaintiffs are welfare recipients residing in a "welfare hotel." They brought suit to prevent the New York City Department of Social Services from disclosing information in their welfare records without their consent to the New York City Housing Authority, which was accepting applications from persons in "welfare hotels" on an emergency priority basis. The complaint claims that state law and state regulations, as applied to authorize the alleged threatened disclosures, are unconstitutional and in violation of federal law. The City Department of Social Services has agreed not to divulge to the Housing Authority any confidential information from

the welfare records of the plaintiffs or other persons similarly situated without their consent, and there is no claim of any threat that it will not continue to adhere to this policy. The only other agreement which the plaintiffs seek is that the City Department bear certain burdens as to counsel, relating not to any constitutional or federal issue but only to the would-be class action nature of the suit. There is no claim as to this issue in the complaint.

Is the case moot, or are the plaintiffs entitled to maintain this action for injunctive relief and for the invalidation of state law, merely because of their disagreement with the defendants on a non-constitutional and non-federal issue not raised in their complaint?

Statement of the Case

(1)

The complaint alleges the following: Plaintiffs are all residents of the Broadway Central Hotel and recipients of public assistance under the Aid to Families with Dependent Children program (A 17-A 18).* In March of 1971 the City Department of Social Services assured plaintiffs that the City Housing Authority "would take applications for low-cost public housing from all welfare recipients with families residing in the Broadway Central Hotel, and would place eligible recipients in public housing units on an emergency priority basis" (A 19). Subsequently, Robert Jorgen, an assistant to the City Commissioner of Social Services, told the plaintiffs and other welfare recipients residing at the hotel that the Department was empowered to release information from welfare files without recipients' consent and that such information could and would be released to the New York City Housing Authority, upon its request, with respect to applications for low-cost public housing (A 20-A 21). The plaintiffs oppose such release (A 21).

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*Numbers in parentheses preceded by "A" refer to pages of the appendix annexed to the petition for certiorari.

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There are no allegations that any of the plaintiffs' confidential welfare records have been disclosed without their consent. There is no claim that it would be improper for the Housing Authority to require waivers from those persons who seek the benefit of priority treatment allowing them to be placed in public housing immediately, and before those on the waiting list. There is no claim of any actual or threatened disclosure of the records of any plaintiffs who had not made voluntary applications for such emergency priority treatment. The complaint is merely directed to the alleged threat that, where the application for such relocation has been made, information may be released without obtaining consent (A 20-A 21).

The claim of the complaint is that New York Social Services Law, Section 136, and state regulations implementing the statute, as applied to allow disclosure of welfare records without consent of recipients, violate the constitutional right to privacy and violate federal law (A 15-A 16, A 22-A 24). The complaint seeks declaratory and injunctive relief (A 24-A 25).

Neither of the defendants has answered the complaint.

(2)

In April of 1971, all parties entered a stipulation by which the defendants agreed that, pending a hearing on a motion (not yet made) for a preliminary injunction, there would be no disclosure of welfare records of the plaintiffs or others similarly situated without their consent to the New York City Housing Authority or related agencies (A 27-A 29).

Thereafter, the parties proffered new stipulations to embody the continuation and extension of the earlier agreement. The one prepared by the plaintiffs appears at pages A 30-A 32. The one prepared by the defendants is not included in the plaintiffs' appendix to this Court but it appears at pages A 24-A 26 of the appendix to the Court of Appeals. The defendants agreed, as they had in the earlier stipulation, that no information would be divulged to the

Housing Authority or any other City agency engaged in housing or relocation of residential tenants without consent except the facts that an individual is a recipient of public assistance, that he is in desperate need of housing and that the public assistance will contain sufficient funds for the rent.

The stipulation proffered by the plaintiffs was virtually identical except that it contained an additional provision requiring the defendants to make certain notifications to recipients regarding counsel and requiring the defendants, where the recipients have counsel, to ask counsel, and not the recipients, for consent (A 30-A 32).

Solely because the defendants refused to go along with the plaintiffs' provision as to counsel, the plaintiffs proceeded to move for a preliminary injunction (Pltfs'. mem. in support of mot. for three-judge court, p. 3, in Doc. #13 of Record on Appeal to Court of Appeals. See Pet. for Cert., p. 20).

On June 9, 1971, the District Court (Croake, D. J.), denied the motion for a preliminary injunction, noting that it had been agreed by all sides that there would be no release of confidential files without consent (A 2-A 6).

The Court went on to say that the motion for a preliminary injunction would have been unnecessary but for disagreement on the sole, nonconstitutional issue of "the proper role of counsel for a class such as this" (A 4-A 5).

Consequently, the Court denied the motion "with the proviso that should the defendants renege on any element of their self-imposed restrictions, plaintiffs may bring on another motion for injunctive relief" (A 5-A 6). The Court thus indicated its understanding that the defendants' avowal of non-disclosure was not limited to the period prior to the hearing of the motion.

Thereafter, the plaintiffs moved for an order allowing the action to be maintained as a class action and for the convening of a statutory three-judge court. This motion was denied and the complaint dismissed (A 7-A 8).

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Opinion of the Court of Appeals

After reviewing the facts, the stipulations between the parties and the actions of the various District Judges, the Court of Appeals stated, "The difficulty with plaintiffs' position is that there is no threat at all to any [constitutional right to privacy] assuming arguendo that it existed in the facts we have outlined" (A 12). It found that, "Even before the complaint was served, the [defendants] had officially retreated from the initial position of proposed disclosure in the case of the plaintiffs here as well as all those in comparable situations" (A 12). The Court noted that "the only substantial difference" between the stipulation proposed by the defendants and that of the plaintiffs was the plaintiffs' requirement of counsel rather than recipient notification, a difference which it found "hardly approached constitutional dimensions since it only concerned the proper role of counsel in a class action" (A 11, A 12).

The Court, after observing that there was no indication or claim that the understanding that there would be no disclosure had been breached, said (A 12):

> "Moreover, on appeal counsel for appellants has stated that none of the plaintiffs is any longer housed in a 'welfare hotel' so that there is no longer any possibility of disclosure, real or threatened. The case is therefore completely moot. Not only do we have no plaintiffs in a position to urge an invasion of constitutional rights, we have defendants of responsible agencies repeatedly disclaiming any intention of so doing. We prefer not to indulge in the luxury of deciding hypothetical questions and in fact we are constitutionally prohibited from engaging in such a fanciful undertaking."

The Court added that, even assuming the case had not been moot until the appeal, this was not a case where the "reviewing court may take jurisdiction where the issues are capable of repetition and yet evade review" (A 13).

In answer to the plaintiffs' claim that the defendants should have promulgated a rule as to non-disclosure, the Court commented (A 13, fn. 4), "We cannot assume that the failure of public agencies to accept counsels' draft is attributable to a change of position in view of their persistent adherence to the principle of non-disclosure without consent for more than a year."

While not reaching the merits, the Court noted that the New York City Housing Authority is bound to confidence by state law and thus is apparently in conformity with the requirements of federal law as to disclosure (A 12, fn. 3). Said the Court (*id.*), "We mention this only to further illustrate the unrealistic aura of the action and particularly this appeal."

ARGUMENT

There was no actual, live case or controversy before the District Court or on appeal. There was no showing that the defendants had ever violated any rights of the plaintiffs; the defendants agreed from the beginning not to engage in the allegedly improper disclosures; and the defendants have consistently adhered to the principle of non-disclosure. Since the federal courts may not exercise jurisdiction over moot cases, the complaint was properly dismissed.

The plaintiffs are seeking to force the federal courts to exercise their jurisdiction to strike down a state statute and grant injunctive relief even though the sole alleged basis for the suit has been resolved and there is no hint of a threat to any of plaintiffs' rights. It is undisputed that the sole reason the plaintiffs have continued to maintain this lawsuit is that the defendants refused to agree to the plaintiffs' demands as to counsel, demands newly made and raising no constitutional or federal issue.

The jurisdiction of the federal courts is circumscribed by the requirement in Article 3, Section 2, of the United States Constitution, that they decide only "cases" or "con-

troversies". This requirement precludes adjudication of cases which are moot or hypothetical. 6A *Moore's* FEDERAL PRACTICE, § 57.13; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86-91 (1947); *Golden* v. *Zwickler*, 394 U. S. 103 (1969); *Lion Mfg. Corp.* v. *Kennedy*, 330 F. 2d 833, 838-841 (D. C. Cir., 1964).

The elements essential to relief must exist at the time of hearing and not merely when the action was initiated. *Golden* v. *Zwickler*, 394 U. S. 103, 109-110 (1969).

"Anticipations of possible danger afford no basis" for present judicial action. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360, 362 (1919). In that case, an action was brought to enjoin the Postmaster General from seizing control of cable properties. Since the properties had been returned and the money refunded prior to the decision of the Supreme Court, the Court refused to reach the merits, noting that it is not within its jurisdiction to give advisory opinions or decide hypothetical cases. To like effect, see for example, *Hall* v. *Beals*, 396 U. S. 45 (1969); *Poe* v. *Ullman*, 367 U. S. 497 (1961); *Oil Workers Union* v. *Missouri*, 361 U. S. 363, 368-369 (1960); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947); *Demby* v. *Wexler*, 436 F. 2d 570 (2nd Cir., 1970).

In *Golden* v. *Zwickler*, 394 U. S. 103 (1969), where the plaintiff challenged a law prohibiting him from passing out handbills and the handbills he had wanted to pass out were in opposition to a particular congressional candidate, the Court held that the case was moot because the candidate had been named a judge and it was not likely he would run for Congress again. It spoke of the need for "a specific live grievance." 394 U. S. at p. 110.

The facts of this case place it squarely within the pattern of those which must be dismissed for absence of a live case or controversy. The City Department of Social Services has already agreed not to perform the allegedly threatened act which forms the basis of the lawsuit. It agreed in April 1971, at the very beginning of the suit, that

pending hearing of any motion for a preliminary injunction, it would not disclose any confidential information from the welfare records of the plaintiffs or other persons similarly situated to the New York City Housing Authority or to any other City agency involved in housing or relocation without consent (A 27-A 29).

The later stipulations proffered by each side were virtually identical to one another and to the earlier signed stipulation except in the sole respect that the plaintiffs sought certain agreements as to notification of counsel which related only to the class action nature of the suit.

As noted by the Court below, not only did the defendants "officially retreat" from any threat of disclosure at the very beginning of the lawsuit, but, "The removal of any threat of disclosure was further attested in the signed stipulations of defendants reviewed by Judges Croake [who denied the motion for a preliminary injunction] and Bonsal [who, *inter alia*, dismissed the complaint]" (A 12). The Court noted that Judge Bonsal's order "was made 'upon the proffered stipulations of the defendants' " (A 12, fn. 1).

It is obvious that the defendants would consider themselves bound by their stipulation where they avowed that they would abide by it in open court and where the Court made the stipulation a basis for its decision.

The plaintiffs' suggestion that the Court should have ignored the mooting of the issues in the complaint simply because they injected a totally new issue (the counsel issue) as to which no agreement was reached is absurd. The mooting of the plaintiffs' cause of action was independent of any such new issue. As the Court below found, the disagreement as to counsel presents no constitutional question but merely the question of fashioning representation in a class action (A 12).

There was no allegation in the complaint that the defendants had actually misused any of the plaintiffs' welfare records. All there is in the complaint is an allegation of a

threat that disclosure would be made, despite the absence of consent, where a recipient made a voluntary application for an emergency priority relocation to public housing in advance of those on waiting lists. Thus, this is not a case of an entrenched and long-standing practice which the plaintiffs have reason to fear will recur.

In contrast, the cases cited by the plaintiff, for the proposition that the mere cessation of allegedly illegal conduct does not render a case moot, involved situations where there had been actual, undisputed occurrences of the conduct complained of. For example, in *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir., 1966), relied upon at page 13 of the petition for certiorari, there had been an official system of unwarranted blanket searches under which there had been some 300 such searches over a period of 19 days. 364 F. 2d at pp. 199, 201, 203. Moreover, there the practice had "been renounced only obliquely, if at all, and the danger of repetition [had] not been removed" (p. 204). In *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), relied upon by the plaintiffs at pages 16-17 of the petition, the criminal law being challenged remained on the books, though in disuse, and constituted a continuing impediment. Here the plaintiffs simply assert that the Department of Social Services has "the power and personnel" to release confidential information (Pet. for cert., p. 9).*

There are exceptional cases, such as *Carroll* v. *Princess Anne*, 393 U. S. 175, 178-179 (1968), where the high probability that the legal dispute will recur and that it will involve the identical plaintiff, coupled with the fact that the nature of the dispute inherently evades review (e.g. because the dispute involves a short term criminal sanction or injunction which has expired), may lead the courts to decide the merits of what would otherwise be a moot case.

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* The affidavit submitted by the plaintiffs to this Court (A 39-A 42) contains their first suggestion of any actual incident of disclosure. At best, the affidavit indicates an individual employee's failure to abide by the general administrative policy.

However, in the absence of such factors, the case must be dismissed as moot. As stated by the Court below (A 13):

> "While it is true that when an action becomes moot on appeal, the reviewing court may take jurisdiction where the issues are capable of repetition and yet evade review (see *Perrucci* v. *Gaffey*, 450 F. 2d 356, 357 (2nd Cir. 1971)), this case does not fall within that category. Even assuming that the case was not moot when the motions were made below, there is nothing to indicate that the Departments have threatened to violate the stipulations we have referred to, and of course the plaintiffs [whose counsel stated they are no longer tenants in welfare hotels (A 12)] no longer have any legally protectible interest to assert."

That the action was brought as a class action does not alter its mootness, since, as noted by the Court below, the defendants' agreement not to disclose welfare records is applicable not only to the plaintiffs but to all those in comparable situations (A 12). In *Watkins* v. *Chicago Housing Authority*, 406 F. 2d 1234 (7th Cir., 1969), the Court of Appeals held an action challenging eviction proceedings by the Housing Authority as unconstitutional to be moot because the state eviction suits had been settled and the tenants restored. The Court rejected the argument that class relief could still be granted, despite the mootness of the named plaintiffs' actions, since there was no claim that any had in fact been sued for possession or that they would be treated differently from the named plaintiffs.

The plaintiffs' claim that the defendants' agreement is inadequate because it does not give them all the relief they seek is without merit. The basis for the entire suit was the alleged threat of disclosure to the City Housing Authority. There was never any claim of threatened disclosure to anyone else. So utterly hypothetical a possibility could not form the basis of federal jurisdiction.

The Court below noted the defendants' "persistent adherence to the principle of non-disclosure without consent

for more than a year" (A 13, fn. 4). Thus, the Court did not merely rely on "the word of an attorney," as suggested by the plaintiffs (Pet. for cert., p. 15), but on the entire record of non-disclosure.

The plaintiffs' reliance on the *Almenares* case (Pet. for cert., pp. 14-15) is misplaced. In *Almenares* v. *Wyman*, 453 F. 2d 1075 (1971), cert. den. 405 U. S. 944 (1972), the Second Circuit had required State and City welfare agencies to provide fifteen days' notice of welfare discontinuance or reduction, in compliance with federal regulations. Later, the State and City welfare administrations understood a directive of the federal Department of Health, Education and Welfare as meaning that the notice requirement should not be applied to a new automatic decrease in welfare payments occasioned by the rise in social security payments. Subsequently the District Court held that the order of the court in the original *Almenares* case should have been followed in all circumstances. It is clear, however, from the District Court opinion that the Court did not regard the matter as one of wilful disobedience of the Court order or as involving dishonesty or subterfuge. It treated the situation as involving an error resulting from misunderstanding and poor judgment.

CONCLUSION

The petition for a writ of certiorari should be denied, with costs.

December 13, 1972.

Respectfully submitted,

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